No. 98-1109

(3)

In The

Supreme Court of the United States

October Term, 1998

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
PETITIONERS,

v.

ILLINOIS COUNCIL ON LONG TERM CARE, INC.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in dismissing cross-petitioner's challenge to the vagueness of the regulations at 42 C.F.R. § 488.300 *et seq.* as unripe, where the challenged regulations have been enforced for over three years and where exhaustion of administrative remedies would be futile?

PARTIES TO THE PROCEEDING

For Cross-Petitioner's statement of "Parties to the Proceeding", see Brief in Opposition at II. As stated therein and in accordance with Supreme Court Rule 29.1, the Illinois Council on Long Term Care, Inc., states that it has no affiliated corporations, either as parent, subsidiary or otherwise.

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The Illinois Council on Long Term Care, Inc. (the "Council"), respectfully submits this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions below are reproduced in the Petitioner Shalala's Appendix ("Pet. App."). The opinion of the court of appeals is reported at 143 F.3d 1072. Pet. App. 1a-12a. The opinion of the district court opinion is unreported. Pet. App. 13a-21a.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1998. Petitioner Shalala filed a timely petition for a writ of certiorari on January 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

For relevant statutory provisions, *see* Petitioner Shalala's Petition For a Writ of Certiorari at 2 and Respondent Council's Brief in Opposition at 1 ("Opp. Br.").

STATEMENT OF THE CASE

Respondent and cross-petitioner Illinois Council on Long Term Care, Inc., relies upon and incorporates by reference the Statement of the Case in Respondent's Brief in Opposition. The following additional facts are relevant to the issue raised in this conditional cross-petition.

When the Council filed its complaint below, the Secretary filed a motion to dismiss, or in the alternative, for summary judgment, contending that the district court lacked subject matter jurisdiction and that the Council failed to state a claim for which relief can be granted. In response, the Council filed a cross-motion for preliminary injunction. At the hearing on the motions, the district court considered only the Secretary's motion to dismiss for lack of jurisdiction. The district court then granted the motion to dismiss, denied the Secretary's alternative motion for summary judgment as moot, and also denied the Council's motion for preliminary injunction as moot. Pet. App. at 21a. The Council appealed that order. Accordingly, the procedural posture of the case before the Seventh Circuit was an appeal of an order granting a motion to dismiss for lack of subject matter jurisdiction.

The Seventh Circuit reversed the district court's dismissal for lack of subject matter jurisdiction regarding all counts of the complaint, both those arising under Medicare (Pet. App. 3a-7a), and those arising under Medicaid (Pet. App. 7a-9a). Nevertheless, the Seventh Circuit affirmed the dismissal of the counts in the amended complaint[1] that allege that the new regulations are unconstitutionally vague on *ripeness* grounds. Pet. App. 10a-12a. The Council seeks review of the Seventh Circuit's conclusion that the vagueness challenge is unripe.

Because this appeal arises from an order granting a motion to dismiss, the allegations of the Council's complaint are taken as true. The Council alleges that the regulations are unconstitutionally vague because of the Secretary's failure to define certain "scope and severity factors" inspectors use to determine whether a facility is in substantial compliance with the regulations. Am. Compl. ¶ 86. Those factors are set forth at 42 C.F.R. § 488.404. The factors also appear on an enforcement "grid" that is used by inspectors and is included in the State Operations Manual. Am. Compl. Ex. A. The grid was published in 59 Fed. Reg. 56183 (November 10, 1994). *See* Grid, Appendix hereto at A-1 ("App.").

To determine whether the Council's vagueness challenge is ripe, it is necessary for this Court to understand how inspectors use the grid and the scope and severity factors. The "severity" factors are listed vertically on the left side of the grid and range from "No Actual Harm with Potential for Minimal Harm" to "Immediate Jeopardy to Resident Health or Safety." The "scope" factors, listed horizontally across the bottom of the grid, are "Isolated," "Pattern" and "Widespread." When an inspector encoun-

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[1] Amended Complaint, Counts I (Medicaid) and IV (Medicare).

ters a deficiency, he or she must determine which scope and severity factors to apply and then plot the deficiency in one of the boxes in the grid. "Substantial Compliance" exists only when the deficiency falls in boxes A, B, or C of the grid. On the other hand, "Substandard Quality of Care" may exist when a deficiency falls in boxes F, H, I, J, K, or L. Different remedies are imposed depending on the box wherein the deficiency is plotted. (*See* the Remedy Categories listed below the grid, and compare to actions that are "Required" and "Optional" within each box.) For example, if a deficiency is plotted in box F, denial of payment and/or civil money penalties of up to $3,000 per day is required.

The only scope and severity factor that is defined in the regulations is "immediate jeopardy." 42 C.F.R. § 488.301. All the other factors are left undefined in the regulations. This lack of specificity has resulted in arbitrary and discriminatory enforcement of the regulations. Am. Compl. ¶ 87. Inspectors have complete discretion to determine the scope and severity factors for a deficiency. Inspectors can plot a deficiency in virtually any box in the grid and thereby instigate remedies on an *ad hoc*, subjective basis. Certain Illinois nursing facilities have been found out of compliance and providing "substandard quality of care," while others with the same types of deficiencies have been found in "substantial compliance." Am. Compl. ¶ 87. This lack of definition, and the unfettered discretion of inspectors, deprives the Council's members of both fair enforcement of the regulations and fair notice of the deficiencies for which they may be penalized, in violation of their rights to due process under the Fifth and Fourteenth Amendments. Am. Compl. ¶ 88.

Under the regulations, a facility wishing to appeal an enforcement remedy cannot challenge the choice of the

remedy or the scope and severity designations. 42 C.F.R. § 488.408(g)(2) ("A facility may not appeal the choice of remedy, including the factors considered by HCFA or the State in selecting the remedy, specified in § 488.404."). Because the scope and severity of a remedy cannot be challenged in an administrative hearing, published decisions of administrative law judges or administrative appeal boards do not discuss scope and severity factors or whether a particular remedy is appropriate. Thus, no body of administrative law is evolving that clarifies the meaning or application of the scope and severity factors.

REASONS FOR GRANTING CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

I. The Conditional Cross-petition Should Be Granted To Review The Ripeness Of The Council's Vagueness Challenge Because It Is An Important Issue That Is Intertwined With The Jurisdictional Issue Raised By The Secretary.

A. The Council's Vagueness Challenge Raises Issues Of Far-reaching Importance.

If this Court grants the Secretary's petition for writ of certiorari on the jurisdictional issue, it should also consider the ripeness of the Council's vagueness challenge. Thousands of nursing homes nationwide that participate in Medicare and Medicaid are regularly surveyed based on the enforcement grid. App. at 1a. If, as the Council contends, the grid and corresponding regulations are unconstitutionally vague, an entire industry is being unjustly impacted. Nursing homes are being deprived of fair enforcement of the regulations and fair notice of the deficiencies for which they will be penalized, in violation of their due process rights under the Fifth and Fourteenth Amendments. Am.

Compl. ¶ 88. Moreover, both the Secretary and nursing home residents have a substantial interest in ensuring that good nursing homes participating in Medicare and Medicaid are not terminated arbitrarily. Yet because of the vagueness of the regulations and the broad discretion given to inspectors, the government could potentially terminate provider agreements for the majority of nursing facilities participating in Medicare and Medicaid nationwide.

Ripeness is an important issue in actions like this one seeking declaratory and injunctive relief, and the lower courts need this Court's guidance regarding its application. "The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these are in the context of a controversy 'ripe' for judicial resolution." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). If federal question jurisdiction exists for constitutional and statutory challenges to regulations, lower courts should not too hastily dismiss such challenges on ripeness grounds. Substantial constitutional violations could go uncorrected. On the other hand, limited judicial resources demand that courts not entertain jurisdiction in cases that are truly unripe. If this Court entertains the jurisdictional issue the Secretary proposes, the lower courts also need this Court's analysis of the ripeness the Council's claims.

B. The Jurisdictional And Ripeness Issues In This Case Are Interrelated.

The major considerations for determining whether jurisdiction exists for the Council's constitutional and statutory claims also bear on whether the Council's vagueness claim is ripe. This Court has stated that the ripeness doctrine and the application of jurisdiction precluding statutes like § 405(h) "dovetail neatly." *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 60 (1993). The jurisdictional and ripeness issues also "dovetail" here.

As demonstrated in the Council's Brief in Opposition, the Council's statutory and constitutional claims cannot be considered in the administrative review process. Opp. Br. at 3. That is a major reason why § 1331 jurisdiction exists. As this Court reiterated in *Thunder Basin Coal Company v. Reich*, 510 U.S. 200, 207 (1994), whether "a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and *whether the claims can be afforded meaningful review.*" (emphasis added) (citations omitted). *See also McNary v. Haitian Refugee Center*, 498 U.S. 479, 484, 496-97 (1991) (concluding that the limited post-exhaustion judicial review provided by the INA could not adequately address the statutory and constitutional claims at issue).

This same consideration weighs heavily in analyzing ripeness. This Court recognized in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), the link between the adequacy of administrative review and ripeness. *Reno* considered whether federal question jurisdiction existed for two class actions challenging INS regulations. This Court concluded that jurisdiction existed and was not barred by § 1255a(f) of the Immigration Reform and Control Act. *Reno*, 509 U.S. 56-57. However, this Court also concluded that certain class members' claims were not ripe because an adequate administrative review mechanism existed. The *Reno* Court observed that "plaintiffs do not argue that this limited scheme would afford them inadequate review of a determination based on the regulations they challenge. . . ." *Id.* at 60-61. This Court also stated that "plaintiffs' situation is thus different from that of the '17 unsuccessful individual SAW applicants' in *McNary* whose procedural objections, we

concluded, could receive no practical judicial review within the scheme established by 8 U.S.C. § 1160(e)." *Reno*, 509 U.S. at 61 (citation omitted).

By contrast, the *Reno* Court found that claims by any class member subjected to a "front-desking" procedure would be ripe because he "would have no formal denial to appeal to the Associate Commissioner for Examinations nor would he have an opportunity to build an administrative record on which judicial review might be based." *Id.* 509 U.S. at 63-64 (following *McNary*). Hence, this Court has recognized that both jurisdiction and ripeness are determined to some extent by the adequacy of the administrative review mechanism to adjudicate the claims at issue. That is the situation here. Because the Secretary's administrative review system is inadequate to deal with the statutory and constitutional claims at issue, federal question jurisdiction exists, and the Council's vagueness challenge is ripe. In this case, the issues of jurisdiction and ripeness are closely related, and just resolution of this case requires this Court to consider both issues, just as it did in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Toilet Goods Assn., Inc. v. Gardner*, 387 U.S. 158, 164 (1967); and *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993).

II. Under This Court's Controlling Precedent, The Council's Vagueness Challenge Is Ripe For Adjudication.

The Seventh Circuit erred in concluding that the vagueness challenge was unripe. The basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the

challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136 148-49 (1967). This Court's long-standing test for ripeness is two-fold, "requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. This Court has relied on the *Abbott Laboratories* test repeatedly.[2] Under both *Abbott Laboratories* factors, the Council's vagueness challenge is ripe.

The issues are fit for judicial resolution for several reasons. First, these regulations have been in force since 1995 and under them nursing homes have been, and continue to be, surveyed regularly. Approximately 70% have been found deficient. Pet. App. 2a. This is not like the situation in *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726 (1998), where logging under the challenged land use plan could not occur until numerous procedural requirements were fulfilled, and where this Court concluded that the challenger could wait until the threatened harm was more imminent.

Second, the courts will not benefit by further administrative review. A district court reviewing a final decision by the secretary is limited to the administrative record. 42 U.S.C. § 405(g) ("The Court shall have power to enter, *upon the pleadings and transcript of the record*, a judgment affirming, modifying, or reversing

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[2] *E.g., Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726, 118 S.Ct. 1665, 1670 (1998); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 71 (1993) (O'Connor concurring) (citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581-82 (1985); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 109 (1983); *EPA v. National Crushed Stone Assn.*, 449 U.S. 64, 72-73 (1980)).

the decision" (emphasis added)). The vagueness of the regulations cannot be challenged in the administrative review process. Administrative law judges have no power to entertain such claims. Opp. Br. at 3. Accordingly, there would not be an adequate "administrative record" regarding the vagueness of the regulations for a federal court to review on appeal. Moreover, a district court exercising § 1331 jurisdiction that is considering the vagueness of the regulations would benefit from having evidence of how the regulations have been applied in multiple situations. A trade association like the Council can offer substantial evidence regarding how the regulations have been applied against its members in different situations to prove vagueness. This Court recognized in *McNary* that a federal district court sitting as a trial court would be in a superior position to entertain such a challenge compared to a court limited to an administrative record: "Not only would a court of appeals reviewing an individual SAW determination therefore most likely not have an adequate record as to the pattern of INS' allegedly unconstitutional practices, but it also would lack the fact finding and record-developing capabilities of a federal district court." *McNary*, 498 U.S. at 497. A federal district court exercising § 1331 jurisdiction, with its fact-finding and record-developing capabilities, is a better forum to consider a constitutional vagueness challenge than a federal court considering an individual administrative appeal under § 405(g).

Third, the Council's vagueness challenge attacks a widespread systemic problem — the Secretary's failure to adequately define the scope and severity factors. The vagueness of the regulations is readily apparent from the general failure to provide concrete definitions. The issue need not be distilled through some prolonged and futile administrative appeal. "[T]his is not a situation in which

consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations." *Gardner v. Toilet Goods Assn., Inc.*, 387 U.S. 167, 171 (1967). The issue is fit for judicial resolution.

Moreover, withholding court consideration would be burdensome to the Council's members, the second factor in the *Abbott Laboratories* analysis. Under the administrative review mechanism, the only way to preserve appeal rights is to refuse to correct an alleged deficiency and risk termination of one's provider agreement. Opp. Br. at 2. Even if a nursing home did refuse to correct a deficiency and appealed the matter through the administrative process, it would have virtually no opportunity to create an administrative record to support its vagueness challenge that a federal court could review on appeal thereafter.

For all these reasons the Council's vagueness challenge meets the *Abbott Laboratories* test for ripeness. The Seventh Circuit failed to apply the *Abbott Laboratories* test and its decision on ripeness should therefore be reversed.

III. The Seventh Circuit's Ripeness Analysis Is Flawed Because There Will Be No Administrative Law Decisions To Clarify The Regulations With The Passage Of Time.

Rather than applying the *Abbott Laboratories* factors to determine ripeness, the Seventh Circuit relied on the concept that "[a]gencies may use ambiguous standards that acquire meaning through the process of application, just as the common law does." Pet. App. 10a. (citing cases). The court also said that the Council "cannot ask for an all-at-once review but must wait until the agency has worked through the process of adding detail in administrative adjudication." Pet. App. 11a. Such reasoning *assumes* that

standards will get clearer over time through administrative decisions. That assumption does not apply here.

Under the regulations, a facility wishing to appeal an enforcement remedy cannot challenge the choice of the remedy or the scope and severity designations. 42 C.F.R. § 488.408(g)(2) ("A facility may not appeal the choice of remedy, including the factors considered by HCFA or the State in selecting the remedy, specified in § 488.404."). Because the scope and severity of a remedy cannot be challenged in an administrative hearing, published decisions of administrative law judges do not discuss scope and severity factors or the appropriateness of a particular remedy. Thus, no body of administrative law is evolving that clarifies the meaning or application of the scope and severity factors. By failing to define the scope and severity factors, and by giving inspectors *unreviewable* discretion to select remedies, the Secretary has ensured that the standards will remain subjective and unclear. In these circumstances, exhaustion of administrative remedies is futile, and therefore, the issue is ripe.

The Seventh Circuit also said the Council cannot mount a vagueness challenge without "facts of the case at hand." Pet. App. 10a (citing cases). The court seems to imply that the Council's complaint fails because it did not set forth specific fact scenarios wherein remedies were imposed. However, this confuses the "notice pleading" requirements with the burden of proof at trial. The Council's complaint satisfied the notice pleading standards of FRCP 8(a). The complaint need not have alleged individual fact patterns to state a claim that the regulations were vague. At trial, the Council can provide multiple examples of how the regulations have been randomly applied against its members. Federal courts are not to invent "heightened pleading standards" beyond the usual pleading requirements of FRCP

8(a). *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (courts may not apply a heightened pleading standard in civil rights cases alleging municipal liability under 42 U.S.C. § 1983). The Seventh Circuit should at least have remanded the vagueness counts for further factual development to determine ripeness, as it did with the due process claim. Pet. App. at 12a. Outright dismissal without giving leave to amend was clearly erroneous, especially after having concluded that jurisdiction existed for the claim. It was also contrary to this Court's approach in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 66-67 (1993) (remanding for district courts to determine which class members were front-desked for purposes of determining ripeness).

CONCLUSION

For the foregoing reasons, the conditional cross-petition should be granted and the dismissal of the Council's challenge to the vagueness of the regulations should be reversed.

Respectfully Submitted,

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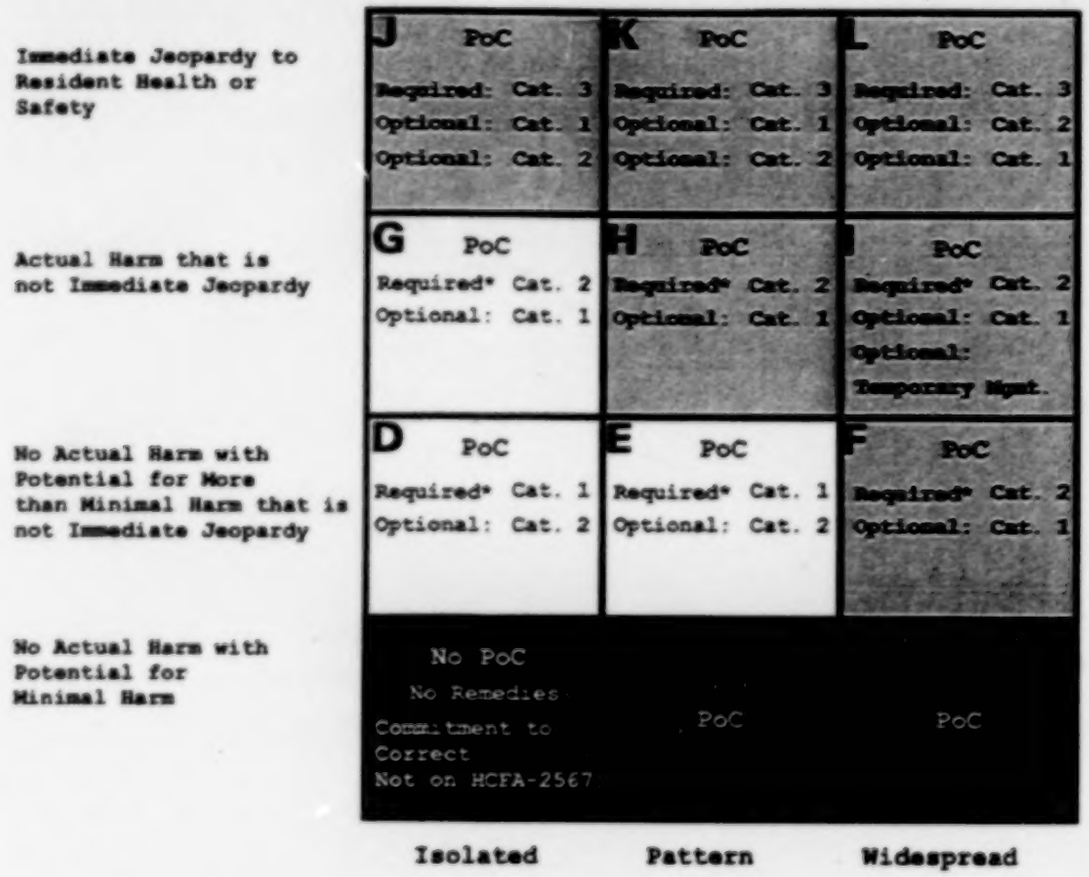

Substandard quality of care: any deficiency in §483.13 Resident Behavior and Facility Practices, §483.15 Quality of Life, or in §483.25, Quality of Care that constitutes: immediate jeopardy to resident health or safety; or, a pattern of or widespread actual harm that is not immediate jeopardy; or, a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm.

Substantial compliance

REMEDY CATEGORIES

Category 1 (Cat. 1)

Directed Plan of Correction
State Monitor; and/or
Directed In-Service Training

Category 2 (Cat. 2)

Denial of Payment for New Admissions;
Denial of Payment for All Individuals; imposed by HCFA;
and/or
Civil Money Penalties:
$50 - $3,000/day

Category 3 (Cat. 3)

Temporary Management Termination

Optional:

Civil Money Penalties
$3,050 - $10,000/day

Denial of Payment for New Admissions must be imposed when a facility is not in substantial compliance within 3 months after being found out of compliance.

Denial of Payment and State Monitoring must be imposed when a facility has been found to have provided substandard quality of care on three consecutive standard surveys.

Note: Termination may be imposed by the State or HCFA at any time when appropriate.

* Required only when decision is made to impose alternative remedies instead of or in addition to termination.